85-396

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

F. SCOTT DUFF,
Petitioner,

V.

COMMONWEALTH OF VIRGINIA,
Respondent

On Writ of Certiorari from the Supreme Court of Virginia

Petition for Writ of Certiorari

William H. Ralston, Jr.
1 Court Square,
Suite 100
Harrisonburg, Virginia 22801

EST AVAILABLE COPY

46 pp

QUESTION PRESENTED

I. WHERE IT IS FACTUALLY IMPOSSIBLE TO DRIVE UNDER THE INFLUENCE OF ALCOHOL AND ONE IS CONVICTED OF DOING SO, DOES SAID CONVICTION VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

F. SCOTT DUFF,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

Petition for Writ of Certiorari

OPINION BELOW

Said opinion is not printed at this time. See Appendix A.

STATEMENT OF JURISDICTION

The judgement of the court below was entered on July 9, 1985. (Appendix A). Rehearing was not sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3) (1976).

CONSTITUTIONAL PROVISION INVOLVED

Section One, Fourteenth Amendment, United States Constitution, which provides:

" All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

On August 14, 1984, in a cause then pending in the Rockingham County General District Court, Criminal Division, entitled Commonwealth of Virginia v. Duff, Criminal Number 7578, Petitioner was tried without a jury and found guilty of Driving While Intoxicated pursuant to Va. Code Ann. § 18.2 - 266 (Cum. Supp. 1983). See Appendix D. At said trial, Petitioner, at appropriate times, orally asserted that his Due Process Rights guaranteed to him by the Fourteenth Amendment, United States Constitution were violated. The court overruled said motions. Because said court is a court not of record in the Commonwealth of Virginia, no record of proceedings are cited thereto.

On August 14, 1984, Petitioner appealed

said conviction to the Rockingham County Circuit Court. See Appendix E.

On September 10, 1984, in a cause then pending in the Rockingham County Circuit Court, entitled Commonwealth of Virginia v Francis Scott Duff, Docket Number 9399, Petitioner was tried without a jury and found guilty of Driving while Intoxicated in violation of Va. Code Ann. § 18.2 - 266 (Cum Supp. 1983). Petitioner's operator's license was suspended for six (6) months and he was fined three hundred fifty dollars ($350.00). See Appendix B. At said trial Petitioner timely moved to strike the evidence and to set aside the verdict, orally asserting that his Due Process rights guaranteed to him by the Fourteenth Amendment, United States Constitution had been violated. The Court overruled said motions. See Appendix C, P. 3-5.

On September 11, 1984, Petitioner timely appealed the decision of the Rockingham County Circuit Court to the Supreme Court of Virginia, Record Number 841814. See Appendix G. Petitioner, in his Petition for Appeal, asserted that his rights guaranteed to him under the Fourteenth Amendment, United States Constitution had been violated. See Appendix F, P. 5.

On July 9, 1985 the Supreme Court of Virginia, Record Number 841814, denied Petitioner's Petition for Appeal. See Appendix A.

B. RELEVANT FACTS

On or about June 29, 1984, in the early morning, Virginia State Trooper Walker was proceeding down public highway, U. S. 11, near the city limits of Harrisonburg, Virginia. Trooper Walker observed an automobile, sitting still, parked beside the highway on a private lot.

Trooper Walker drove to the vehicle, got out of his police car, went over to the vehicle, and called to the defendant. He received no response. Trooper Walker then shook the defendant lightly on the left shoulder and the defendant awoke. Simultaneously, the engine of the vehicle roared as if accelerated in neutral gear. After the defendant became fully awake, Trooper Walker removed the defendant from the vehicle and turned off the engine. The defendant had the odor of alcohol about him, was unsteady, and had slurred speech. Trooper Walker explained to the defendant the Virginia implied consent law and the defendant agreed to a chemical analysis of his blood. The Certificate of Analysis was received in evidence and showed that at the time the test was performed, the defendant had a concentration of .20 one hundredths of one percent of alcohol in his blood.

This Petition involves the sufficiency of proof necessary to convict one of a crime and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970) the court stated: " Winship presupposes as an essential element of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." In Jackson, as here, the Virginia Supreme Court denied the Petition for Appeal. Thus, for the Commonwealth of Virginia to convict the Petitioner of violating Va. Code Ann. §18.2 - 266 (Cum. Supp. 1983), Driving a Motor Vehicle while Intoxicated, it had

to prove beyond a reasonable doubt, 1) that the defendant operated the motor vehicle in question and, and 2) that during said operation the defendant was under the influence of alcohol, narcotic drugs, a self administerd intoxicant, or a drug of whatsoever nature. See Appendix D.

Petitioner argues that the Commonwealth of Virginia offered no evidence at trial proving the first element of the crime, namely, that the Petitioner "operated" the motor vehicle in question. The standard of review for whether Petitioner's conviction rests on sufficient proof was set forth in Jackson, supra,". . . whether, after viewing the evidence in the light most favorable to the Prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia,443, U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 560, 573, (1979)

(Original Emphasis). The Commonwealth of Virginia submitted evidence from which a rational juror could find at most, viewing the evidence in the light most favorable to the Commonwealth of Virginia, that an intoxicated, unconscious person was found by a Virginia State Trooper on the driver's side of motor vehicle whose engine was running. Appendix C, P. 1-3. It is important to note that, based on all the evidence the Commonwealth of Virginia presented, until Trooper Walker awakened the Petitioner and charged him with Driving while Intoxicated, <u>at all times here involved, Petitioner had been unconscious.</u> Appendix C, P. 1-3. <u>It is physically impossible for an unconscious person to "operate" a motor vehicle or anything else for that matter.</u> It is respectfully submitted that the concepts of operation and unconsciousness are mutually exclusive of one another; that is

to say, one can not operate a motor vehicle and be unconscious at the same time. Yet in the case at bar, although there was not a scintilla of evidence that the Petitioner was ever conscious while the car was "operating" (i.e., when the engine was running), he was nonetheless found by the trier of fact to have operated the vehicle and thus was convicted of a crime he was physically incapable of committing.

It is elementary criminal law that there must be some voluntary act or voluntary omission to act before one can commit a crime. Lafave and Scott, Criminal Law § 24-26 (1972). For example, it has been held that one is not guilty of murder if one kills while asleep or in a clouded state between waking and sleeping. Fain v. Commonwealth, 78 Ky. 183, 39 Am. Rep. 213 (1879), cited in Lafave and Scott, Criminal Law, § 25 (1972). Here, like Fain, the Petitioner was unsconscious and therefore

incapable of doing the voluntary act necessary to convict him of operating a motor vehicle.

By analogy, consider a deaf mute who is unable to write or otherwise communicate and the common law crime of Misprision of Felony.

One has a legal duty to report to the proper authorities felonies, cognizable by courts of the United States, committed in one's presence. Consider further that a felony is committed in the presence of the aforementioned handicapped person. It would be physically impossible for him to report the crime committed in his presence, yet not a court in the United States could convict the handicapped person of Misprision of Felony. In the case at bar, because the Petitioner was physically incapable of operating a motor vehicle, an element of the crime with which Petitioner was charged, no rational trier

of fact could find that he did operate a motor vehicle in violation of Va. Code Ann. § 18.2 - 266 (Cum. Supp. 1984).

It should be noted that Petitioner is not disputing what constitutes operation of a motor vehicle, he only disputes the sufficiency of the proof necessary to prove that he operated a motor vehicle.

CONCLUSION

Because an unconscious person is physically incapable of operating a motor vehicle, and because an unconscious person can not commit a voluntary act to operate a motor vehicle in violation of Va. Code Ann. § 18.2 - 266 (Cum. Supp. 1983), no rational trier of fact, after reviewing the evidence in the light most favorable to the Commonwealth of Virginia, could have found that the Petitioner operated the vehicle in question.

Respectfully Submitted,

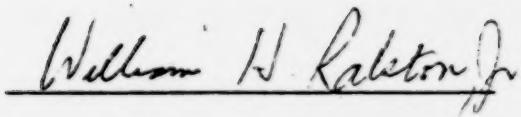
William H. Ralston, Jr.
1 Court Square,
Suite 100
Harrisonburg, Virginia 22801

CERTIFICATE OF SERVICE

I, William H. Ralston, Jr., Counsel of Record for the Petitioner, certify that on September 6, 1985, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, served three copies of the Petition for Writ of Certioari from the Supreme Court of Virginia on each of the parties hereinafter named by first class priority mail:

1) David I. Walsh, Attorney for the Commonwealth, Third Floor, Courthouse, Harrisonburg, Virginia 22801.

2) William G. Broaddus, Esq., Attorney General for the State of Virginia, Office of Attorney General, Supreme Court Building, 101 N. 8th Street Richmond, Virginia 23219



William H. Ralston, Jr.
1 Court Square,
Suite 100
Harrisonburg, Virginia
22801

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON TUESDAY THE 9TH DAY OF JULY, 1985.

Francis Scott Duff, sometimes known as F. Scott Duff, Appellant,

against, Record No. 841814, Circuit Court No. 9399

Commonwealth of Virginia, Appellee.

From the Circuit Court of Rockingham County,

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the

judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy, Testee:

David. B. Beach, Clerk

By: /s/ Cynthia L. McCoy, Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY, September 10, 1984.

COMMONWEALTH

V

FRANCIS SCOTT DUFF

(dob: 8/30/43)

On an appeal from a judgment of the Rockingham District Court - a warrant charging driving under the influence of intoxicants (docket #9399) (offense date: 6/29/84)

This 10th day of September, 1984, came the Commonwealth's Attorney, and the accused, Francis Scott Duff, came Pursuant to his recognizance and by his retained counsel, Dabney Overton, Jr. Thereupon the defendant tendered a plea of not guilty to driving under the influence of intoxicants as charged in the warrant. The accused with the consent of the Court and the Attorney for the Commonwealth,

thereupon waived trial by jury and agreed to submit all matters of law and fact to the Court for hearing and determination. Having heard the evidence herein, it is the judgment of the Court that Francis Scott Duff is guilty of driving under the influence of intoxicants and that the Commonwealth recover of him a fine in the amount of $350.00 and the costs incident to this proceeding. It is further ordered that the defendant's operator's license be suspended for a period of six months.

A TRUE COPY

ATTESTE: /S/ Donna Funkhouser, Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF

ROCKINGHAM COUNTY

COMMONWEALTH

V.

F. SCOTT DUFF

Docket No. 9399

WRITTEN STATEMENT OF FACTS, TESTIMONY AND OTHER INCIDENTS OF THE CASE

This case is a charge of Driving under the Influence under Section 18.2-266 of the Code of Virginia, 1950, as amended; the same was heard before the Circuit Court of Rockingham County, Virginia, on September 10, 1984, having been appealed thereto from the General District Court of Rockingham County, Virginia, by the defendant.

The evidence consisted of the testimony of Virginia State Trooper J. W. Walker and a chemical analysis of the Defendant's blood.

Trooper Walker testified that, in the early morning hours (that is to say while

it was still dark), on or about June 29, 1984, as he was proceeding along the public highway, U. S. Route 11, either just within or just outside the city limits of the City of Harrisonburg, but in either the City of Harrisonburg or the County of Rockingham, Virginia, he observed an automobile parked off of but beside the highway on a private lot, sitting still, with someone slumped over in it on the driver's side. He drove to the vehicle; got out of his police car; and went over to this vehicle. He found someone sitting in the driver's seat, asleep, and the engine of the vehicle was running. He called to this person, but, getting no response, he then shook him lightly on the left shoulder, at which time this person awakened and the engine of the vehicle roared as if accelerated in neutral gear to a high degree. The person so found by the Trooper was the Defendant, and, after becoming fully

awakened, the Trooper got the Defendant out of the vehicle; and the engine on the same was turned off. Trooper Walker further testified that Mr. Duff had the odor of alcohol about him; was unsteady and his speech was slurred.

Trooper Walker further testified that, after he had explained the implied consent law to Mr. Duff, Mr. Duff agreed to a chemical analysis of his blood and the same was made. The Certificate of Analysis was offered and received in evidence and showed that at the time the test was made, Mr. Duff had a concentration of .20 one hundredths of one percent of alcohol in his blood at the time he submitted to the test.

The Commonwealth then rested its case, after which, by counsel, the Defendant moved to strike the evidence of the Commonwealth upon the ground that there had been no evidence presented that the defendant

was driving or operating the vehicle in question; that by the Trooper's own testimony, the Defendant was, in effect, unconscious when he was found; that there was no evidence as to how long he had been there; that there was no evidence as to how he got there; that, although the Supreme Court of Virginia has defined "operation" to include many situations other than actual driving, here the Defendant was physically incapable of doing what he was charged with doing; that is, he was totally unconscious and simply could not physically do what he was charged with having done; that to convict the Defendant under these circumstances would be to convict him of that which he could not physically do; that such a conviction would violate the due process clauses of both the Virginia and the United States Constitutions. The Court overruled the Motion to Strike, to which

the Defendant duly took exception.

Whereupon the Defendant offered no evidence, and, by counsel, both renewed his Motion to Strike and argued the case based upon the same reasons as the original Motion to Strike the evidence. All of which was overruled by the Court and the Defendant duly moved the Court to set aside as contrary to the law and evidence which Motion was overruled and to which the Defendent duly took exception for the same reasons.

F. SCOTT DUFF

By Counsel

/s/ Dabney Overton, Jr.,

Dabney Overton, Jr.
Counsel for Defendant
309 Sovran Bank Building
Harrisonburg, Virginia 22801

/s/ Perry Sarver

Judge, Circuit Court of Rockinham
County, Harrisonburg, Virginia 22801

CERTIFICATE

I hereby certify that a copy of the foregoing was hand delivered this 2nd day of November, 1984, to David I. Walsh, Attorney for the Commonwealth, Rockingham County Courthouse, Harrisonburg, Virginia 22801.

/s/ Dabney Overton, Jr.
Dabney Overton, Jr.

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated. — It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while under the influence of alcohol, or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purposes of this section, the term "motor vehicle" shall include pedal bicycles with helper motors, while operated on the public highways of this State.
(Code 1950, § 18.1-54; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 637.)

Appendix D

NOTICE OF APPEAL

Rockingham.....
CITY OR COUNTY

x General District Court

Juvenile and Domestic Relations

District Court

8/14/84.....Date of Conviction

I, the undersigned, appeal my conviction to the Circuit Court of this city or county. I understand that this appeal may be withdrawn at any time prior to the hearing date set for my case. My case is scheduled to be called for x trial setting of trial date on

September.10,.1984.at.9:30.a.m.....
DATE AND TIME OF APPEARANCE

in the Circuit Court, which is located at

2nd.Floor,.Courthouse,.Harrisonburg,.....
STREET ADDRESS OF CIRCUIT COURT

Va. 22801 703-434-4455 ext. 275
.....
TELEPHONE

I understand that if this appeal is withdrawn within 10 days after my conviction in this District Court, no additional

costs will be taxed against me; otherwise, additional costs will be incurred in Circuit Court. I also understand that upon withdrawal of this appeal, I must comply with the terms of my sentence.

NOTICE IN SUPPORT CASES--Section 20 -74 of the Code of Virginia, 1950, as amended, provides that any order of support or amendment thereof entered by the Juvenile and Domestic Relations District Court shall remain in full force and effect until changed or annulled by the Circuit Court.

WARNING— Your are subject to trial and conviction in your absence if you fail to appear for your case in the Circuit Court. Failure to appear shall be deemed a waiver of your right to trial by jury in this case. Failure to appear may also constitute a separate criminal offense.

I promise to appear before the Circuit Court of this jurisdiction at the date and time shown.

8/14/84
.....
DATE OF APPEAL

_____
APPELLANT

BY _____
ATTORNEY FOR APPELLANT

NOTICE: Promptly communicate with the Clerk of the Circuit Court of this jurisdiction concerning the subpoenaing of witnesses and requesting jury trial and your right of representation by a lawyer if you do not have a lawyer. If your case is scheduled for trial, you MUST be present and ready for trial at the "date and time of appearance" shown above.

FILE NO.

9/10/84 9:30 a.m. T84-7578

dui

6/29/84

Tpr. Walker

NOTICE OF APPEAL

Francis Scott Duff.....

APPELLANT

406 Bradford Lane.....

Huntsville, AL 35811.....

WITHDRAWAL

I, the undersigned, withdraw my appeal in this case.

.....

DATE

APPELLANT

ATTORNEY FOR APPELLANT

COURT USE ONLY

Release on $.....
(CASH OR SURETY)

$.....
(REALTY)

$.....
(PERSONAL RECOGNIZANCE)

Not eligible for bond

Filed in the Clerk's Office

Rockingham County, Va.

Aug 28, 1984

/s/ Donna Funkhouser, Deputy Clerk

IN THE

SUPREME COURT OF VIRGINIA

F. SCOTT DUFF, Appellant,	
V.	RECORD NO.
COMMONWEALTH OF VIRGINIA	841814
APPELLEE,	

PETITION FOR APPEAL

Dabney Overton, Jr.
309 Sovran Bank Bldg.,
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(703) 434-3406

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IN THE

SUPREME COURT OF VIRGINIA

F. SCOTT DUFF,

Appellant,

v. RECORD NO. 841814

COMMONWEALTH OF VIRGINIA,

Appellee.

PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

F. Scott Duff, the Appellant, represents that he is aggrieved by a judgment entered against him by the Circuit Court of Rockingham County, Virginia, on September 10, 1984. This Petition for Appeal raises significant questions of first impression in this Court.

ASSIGNMENTS OF ERROR

I

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO STRIKE THE EVIDENCE OF THE COMMONWEALTH AND DEFENDANT'S MOTION TO SET ASIDE THE CONVICTION OF THE DEFENDANT BECAUSE, AS A MATTER OF LAW, THE EVIDENCE HEREIN WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF THE CRIME CHARGED--TO-WIT: DRIVING UNDER THE INFLUENCE.

II

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO STRIKE THE EVIDENCE OF THE COMMONWEALTH AND TO SET ASIDE THE CONVICTION OF THE DEFENDANT BECAUSE SUCH CONVICTION VIOLATES THE DUE PROCESS CLAUSES OF BOTH THE VIRGINIA CONSTITUTION-- ARTICLE 1, SECTION 8, AND THE UNITED STATES CONSTITUTION-- AMENDMENT XIV, IN THAT THE DEFENDANT WAS CONVICTED OF THAT WHICH HE PHYSICALLY COULD NOT HAVE DONE.

STATEMENT OF THE CASE

On September 10, 1984, F. Scott Duff, the Appellant (hereinafter referred to as Defendant), was tried before the Circuit Court of Rockingham County, Virginia, by the Court sitting without a jury, upon Motion of the Defendant concurred in by the Commonwealth and the Court, said Defendant having appealed his conviction thereof thereto from the General District Court of Rockingham County, Virginia.

At the trial, the Defendant moved to strike the evidence of the Commonwealth at the appropriate time which motion was overruled by the Court. Upon the decision of the Court that the Defendant was guilty as charged, the Defendant moved the Court to set aside said decision as contrary to the law and the evidence which motion the Court also overruled, to both of which rulings the Defendant duly took exception.

Whereupon the Court convicted the Defendant as charged and fixed his punishment within the limits prescribed by law. Final judgment was entered in this case on September 10, 1984.

QUESTIONS PRESENTED

I. WAS THE EVIDENCE SUFFICIENT TO CONVICT THE DEFENDANT OF DRIVING UNDER THE INFLUENCE:

II. IF THE DEFENDANT WAS CONVICTED OF THAT WHICH HE PHYSICALLY COULD NOT HAVE DONE, DOES SUCH CONVICTION VIOLATE THE DUE PROCESS CLAUSES OF BOTH THE VIRGINIA CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES?

STATEMENT OF FACTS

There was no court reporter at the trial of this case and same is submitted upon a written statement of facts,

testimony and other incidents of the case duly submitted, agreed to by all parties, signed by the Court and filed.

The evidence consisted of the testimony of Virginia State Trooper J. W. Walker and a chemical analysis of the Defendant's blood.

Trooper Walker testified that, in the early morning hours (that is to say while it was still dark), on or about June 29, 1984, as he was proceeding along the public highway, U.S. Route 11, either just within or just outside the city limits of the City of Harrisonburg, but in either the City of Harrisonburg or the County of Rockingham, Virginia, he observed an automobile parked off of but beside the highway on a private lot, sitting still, with someone slumped over in it on the driver's side. He drove to the vehicle; got out of his police car; and went over to

this vehicle. He found someone sitting in the driver's seat, asleep, and the engine of the vehicle was running. He called to this person, but, getting no response, he then shook him lightly on the left shoulder, at which time this person awakened and the engine of the vehicle roared as if accelerated in neutral gear to a high degree. The person so found by the Trooper was the Defendant, and, after becoming fully awakened, the Trooper got the Defendant out of the vehicle; and the engine on the same was turned off. Trooper Walker furtner testified that Mr. Duff had the odor of alcohol about him; was unsteady and his speech was slurred.

Trooper Walker further testified that, after he had explained the implied consent law to Mr. Duff, Mr. Duff agreed to a chemical analysis of his blood and the same was made. The Certificate of Analysis was

offered and received in evidence and showed that at the time the test was made, Mr. Duff had a concentration of .20 one hundredths of one percent of alcohol in his blood at the time he submitted to the test. The Commonwealth then rested its case; the Defendant offered no evidence.

ARGUMENTS

I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF DRIVING UNDER THE INFLUENCE.

The general proposition of law here involved is quite simple: "it is well settled in Virginia that to justify conviction of a crime, it is not sufficient to create a suspicion of probability of guilt, but the evidence must establish the guilt of an accused beyond a reasonable doubt. It must exclude every reasonable hypothesis

except that of guilt. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." Cameron v. Commonwealth, 211 Va. 108, 110; 175 S.E.2d275 (1970). Of course, in dealing with particular cases the application of the general proposition can be difficult.

The issue in this case is whether the Commonwealth has proved that the Defendant was "operating" the vehicle in question at the time and place he alleged. This Court has considered the matter of what constitutes "operating" on numerous occasions. See e.g., Gallagher v. Commonwealth, 204 Va. 666 (1964); Nichols v. Commonwealth, 212 Va. 257 (1971). Lyons v. City of Petersburg 221 Va. 10 (1980). However, none of these cases deal with the issue

of whether, where the only evidence in the case is that the Defendant was actually asleep, regardless of where he was in the car or whether the engine was running or not, the Defendant can be said to be "operating" the vehicle in question. Indeed, in other jurisdictions it appears that being asleep negates the Defendant being in "physical control" of the vehicle. Commonwealth v. Shindledecker, 10 Adams Co. Leg. 159 (Pa. 1969) and State v. Hall, 271 Wis. 450, 73 N.W. 2d 585 (1955), both cited in an Annotation at 93 A.L.R.3d 7.

The record is utterly silent as to how the Defendant happened to be where the Trooper found him: how he got there; how the vehicle got there; who caused it to get there; who caused the engine to be running; how long the Defendant had been there; how long the vehicle had been there; whether

Defendant or someone else had driven it there; and so on. All that the evidence establishes is a sleeping, intoxicated, person was found behind the wheel of a vehicle with the engine running.

II

THE DEFENDANT WAS CONVICTED OF THAT WHICH HE PHYSICALLY COULD NOT HAVE DONE. SUCH CONVICTION VIOLATES THE DUE PROCESS CLAUSES OF THE VIRGINIA CONSTITUTION, ARTICLE 1, SECTION 8, AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV.

The Constitution of Virginia, Article 1, Section 8 provides, in part:

> "That in criminal prosecutions . . . He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, . . ."

The Constitution of the United States, Amendment XIV provides, in part:

". . . . Nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

In this case, the evidence in uncontradicted, undisputed, and absolutely certain that the Defendant was asleep and incapable of anything including responding to the Trooper, until he was awakened. Although it might be suggested that the acceleration of the vehicle upon his awakening by the Trooper constituted some form of operation, we would submit that there is absolutely no evidence as to the cause of this acceleration, and, in any event, the notion that the Defendant might have caused it (whether his foot actually hit the accelerator or not--this is speculative), is fallacious, since nothing happened with this vehicle

until the Trooper did what he did, which was to shake the Defendant's left shoulder.

We submit that it is axiomatic and needs no citation of authority to state that both of the foregoing constitutional provisions prohibit a person being convicted of something he physically is incapable of doing. In this case the Defendant was so physically incapable of operating a motor vehicle or doing anything else; it took being shaken by the Trooper to render him capable of anything. This being an established fact in this case, we submit that the Commonwealth has proved beyond any question whatsoever that the Defendant was physically incapable of operating the motor vehicle he was sitting in, and, thus, incapable of violating

Section 18.2-266 of the Code of Virginia. Therefore, it was a violation of both constitutional provisions for him to be convicted of doing so.

CONCLUSION

For the foregoing reasons, the Defendant submits that the judgment of the trial court should be reversed and final judgment entered for the Appellant.

Respectfully submitted,

F. SCOTT DUFF

By Counsel

/s/ Dabney Overton, Jr.
Counsel for Appellant
309 Sovran Bank Building
Harrisonburg, Va. 22801
(703) 434-3406

CERTIFICATE

In accordance with Rules 5:22 and 5:42, I certify that:

(a) The parties and their counsel, respectively, in this case are:

Appellant: F. Scott Duff

Dabney Overton, Jr., Esquire
309 Sovran Bank Building
Harrisonburg, Virginia 22801
(703) 434-3406

Appellee: Commonwealth of Virginia

David I. Walsh, Esquire
Commonwealth Attorney
Rockingham County Court House
Harrisonburg, Virginia 22801
(703) 434-4455 Ext. 288

(b) Neither counsel is court appointed;

(c) Counsel for Appellant desires to state orally in person the reasons for granting the Petition;

(d) Supersedeas is requested; and

(e) A copy of the Petition for Appeal was hand delivered this 7th day of December, 1984, to opposing counsel.

/S/ Dabney Overton Jr.
Dabney Overton, Jr.,
Esquire
Counsel for F. Scott Duff

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

COMMONWEALTH

Docket No: 9399

V. NOTICE OF APPEAL

F. SCOTT DUFF

Pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, the defendant, F. Scott Duff, gives notice of appeal to the judgment entered in this matter on September 10, 1984, to the Supreme Court of Virginia. A statement of facts of the case will be hereafter filed.

F. SCOTT DUFF
By Counsel

Dabney Overton, Jr., Esquire
Counsel For Defendant
309 Sovran Bank Building
Harrisonburg, Virginia 22801

FILED IN THE CLERK'S OFFICE
ROCKINGHAM COUNTY, VA.

SEP. 11, 1984
/s/ Donna Funkhouser, Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was hand delivered to David I. Walsh, Esquire, Attorney for the Commonwealth, Third Floor, Court House, Harrisonburg, Virginia,22801, This 11th day of September, 1984.

/s/ Dabney Overton, Jr., Esquire